

STATE OF MICHIGAN
COURT OF APPEALS

TRACI WEBBER, Personal Representative of the
Estate of JANIE L. WEBBER, Deceased,

Plaintiff-Appellant,

v

GEORGE HILBORN and HILBORN &
HILBORN, P.C.,

Defendants-Appellees.

UNPUBLISHED
August 17, 2006

No. 267582
Oakland Circuit Court
LC No. 2003-055071-NM

Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition to defendants pursuant to MCR 2.116(C)(7) and (8) in this legal malpractice action. We reverse and remand.

The legal malpractice action is based on an underlying products liability action against an auto manufacturer following a fatal crash. The underlying action involved an allegedly defective truck in which plaintiff's 17-year-old daughter was killed. Defendants failed to preserve the truck, and it was destroyed. Defendants then recommended to plaintiff that they dismiss the case,¹ and requested that plaintiff sign a stipulation to allow defendants to withdraw as counsel. Plaintiff refused to sign the stipulation, so defendants filed a motion to withdraw as counsel, which was granted.

Plaintiff had been named personal representative of her daughter's estate on April 19, 2001. On September 18, 2003, the probate court, on its own motion, suspended plaintiff's powers as personal representative. This action for legal malpractice was filed on December 23,

¹ Defendants acknowledged in this correspondence with plaintiff that the loss of the truck as evidence created a problem, but also, for the first time, according to plaintiff, raised the issue of comparative negligence. Defendants asserted that because there were no witnesses to confirm decedent had been wearing a seatbelt, and failure to wear a seatbelt could result in a finding of 51% negligence, which would preclude any recovery.

2003. Defendants filed a motion for summary disposition, arguing that plaintiff lacked standing to bring the claim because she was no longer personal representative to the estate. The trial court agreed and granted the motion. Plaintiff filed a motion to amend the complaint, and filed in the probate court a petition to reopen the estate. Both were granted. In an order dated November 3, 2004, the probate court reopened the estate nunc pro tunc, and plaintiff was appointed personal representative.

Plaintiff filed her first amended complaint on November 5, 2004, with the only amendment being her status as personal representative. Defendants filed a motion for summary disposition, arguing the claim was time-barred. While this motion was pending, defendants filed another motion for summary disposition, arguing that the first amended complaint failed to allege a prima facie case of legal malpractice because plaintiff did not adequately allege a theory of liability or identify a specific defect that would have led to a successful recovery in the underlying case. The trial court granted summary disposition in favor of defendants, finding the claim was time-barred because the relation-back doctrine was inapplicable, and finding that plaintiff had failed to properly plead proximate causation in the amended complaint. Plaintiff filed this appeal.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The trial court determined that defendants were entitled to summary disposition under MCR 2.116(C)(7), because plaintiff's amended complaint did not relate back to the filing of the original complaint and was barred by the applicable statute of limitations. We disagree.

The parties and the trial court examined whether plaintiff's reappointment as personal representative related back to the filing of the complaint pursuant to the common-law "relation back" doctrine. See *Saltmarsh v Burnard*, 151 Mich App 476; 391 NW2d 382 (1986).² However, we conclude that this situation is controlled by MCL 700.3701, which provides:

² We note that if we did apply the *Saltmarsh* test, we would still find that plaintiff's complaint after the technical matter of her status as personal representative was cured relates back to the complaint previously filed. This Court in *Saltmarsh* held that "an appointment as administrator after the period of limitations has expired relates back to the filing of suit if, at the time the suit was filed, the plaintiff holds a good faith reasonable belief that he has authority to bring suit as administrator, provided that the defendant is not prejudiced by the application of the relation-back doctrine in such situations." At 491. Here plaintiff's original Letters of Authority specified that they had no expiration date, which supports the reasonableness of plaintiff's belief that she was empowered to act for the estate. And defendants are not prejudiced by the relation back. Rather, they simply are not positioned to avail themselves of a windfall premised on a technicality.

In addition, we note that because the probate court ordered the estate reopened nunc pro tunc, our reading of that order would indicate that it is now as if the suspension of plaintiff's authority as personal representative had never happened at all.

A personal representative's duties and powers commence upon appointment. *A personal representative's powers relate back in time to give acts by the person appointed that are beneficial to the estate occurring before appointment the same effect as those occurring after appointment.* Before or after appointment, a person named as personal representative in a will may carry out the decedent's written instructions relating to the decedent's body, funeral, and burial arrangements. A personal representative may ratify and accept an act on behalf of the estate done by another if the act would have been proper for a personal representative. [Emphasis added.]

Under this statute, plaintiff's powers as personal representative following her reappointment relate back to validate the filing of the original complaint. See *Chernoff v Sinai Hosp of Greater Detroit*, 471 Mich 910; 688 NW2d 284 (2004) (Markman, J. concurring). The parties do not dispute that plaintiff's original complaint was timely filed. We also agree with plaintiff that the statute of limitations was tolled once the complaint was filed and defendants were served. MCL 600.5856(a). Therefore, the first amended complaint was not barred by the statute of limitations, and the trial court erred in concluding otherwise.

We also disagree with the trial court's holding that summary disposition was warranted under MCR 2.116(C)(8) because plaintiff's amended complaint failed to state a claim upon which relief could be granted. "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. Summary disposition pursuant to MCR 2.116(C)(8) should be granted "only when the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden, supra*, p 119.

A plaintiff claiming legal malpractice must adequately allege the existence of an attorney-client relationship, negligence in the representation, proximate causation of injury, and the fact and extent of the injury. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). Plaintiff alleged the existence of an attorney-client relationship. She also alleged negligence in defendants' failure to secure the vehicle during the first visit to the site, delay in filing for a protective order, and failure to follow up to ensure that the vehicle would not be destroyed. With respect to causation and the fact and extent of the injury, plaintiff alleged, "[w]ithout the vehicle, the Webbers had no realistic chance of proving that the vehicle was defective." In addition, plaintiff alleged:

As a direct and proximate result of the breaches already listed, Plaintiff and all the rest of kin of Janie Lynn Webber have been inured [sic] and damaged in that they have lost available cause [sic] of action and they experienced mental anguish and emotional stress concerning Janie's wrongful death and the inability of Defendant to provide them with justice, and they have lost the full value of the case Defendant Hilborn had brought for them under the Wrongful Death Act.

The allegations that plaintiff "lost available cause [sic] of action" and "lost the full value of the case" adequately alleged proximate causation and the fact and extent of injury.

The trial court also held that the allegations were deficient because they did not identify a specific defect and theory of products liability. Generally, a complaint must contain a statement

of the facts and allegations sufficiently specific to reasonably inform the opposing party of the nature of the claims against him. MCR 2.111(B)(1); *Smith v Stolberg*, 231 Mich App 256, 259; 586 NW2d 103 (1998). We believe that the allegations were sufficient to apprise defendants of the nature of the claims against them. In particular, the references to the defect in the truck and “the loss of the full value of the case Defendant Hilborn had brought” indicate that plaintiff was relying on the theories of liability alleged by defendants in the underlying action against the manufacturer. Defendants’ argument that they were uncertain of the bases of the action against them is belied by their participation in the litigation for 18 months before seeking greater specificity. The lack of greater specificity did not entitle defendants to summary disposition pursuant to MCR 2.116(C)(8).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis

/s/ Jessica R. Cooper

/s/ Stephen L. Borrello